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IN THE
Supreme Court of the United States

OCTOBER TERM 1940

No. 268

MISSOURI-KANSAS PIPE LINE COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA, COLUMBIA
GAS & ELECTRIC CORPORATION, COLUMBIA
OIL & GASOLINE CORPORATION, GEORGE H.
HOWARD, PHILIP G. GOSSLER, CHARLES A.
MUNROE, THOMAS R. WEYMOUTH, THOMAS
B. GREGORY, EDWARD REYNOLDS, JR., BURT
R. BAY and JOHN H. HILLMAN, JR.,
Appellees.

PETITION FOR REHEARING

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Columbia Oil & Gasoline Corporation.

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No. 268

PETITION FOR REHEARING

*To the Chief Justice and the Associate Justices
of the Supreme Court:*

The appellees Columbia Gas & Electric Corporation and Columbia Oil & Gasoline Corporation in the above-entitled cause respectfully ask a rehearing thereof, not for the purpose of asking this Court to change its judgment that the order of the District Court appealed from be reversed; but solely for the purpose of correcting a paragraph of the opinion of this Court which contains a statement of fact believed by the appellees to be contrary to the Record. We, the undersigned counsel for said appellees, make this

request not only in the interest of our clients but also because we believe it to be the duty of counsel in a cause to contribute, in every pertinent respectful way, to the strictest accuracy of the opinions of this Court.

The paragraph of the opinion of this Court to which we refer is as follows:

"A final contention in support of the order remains. It is based on two prior denials of motions by Mogan to intervene. Mogan made these motions on the score of its ownership of more than forty per cent. of Panhandle's stock and claimed standing in its own right. Appeals from these denials were dismissed by the Circuit Court of Appeals, 108 F. (2d) 614, and we denied certiorari, 309 U. S. 687. The denials are now urged as *res judicata*. But they were a rejection of Mogan's attempt to intervene in its own behalf. In neither instance was the relief sought a mode of enforcing Panhandle's rights under Sections IV and V of the decree. The earlier denials involved different legal claims from that now asserted, and therefore are no bar to the present proceeding."

It is respectfully called to the Court's attention that the above statement that neither of the prior motions to intervene involved an attempt, in the interest of Panhandle, to enforce its rights under Sections IV and V of the decree but involved only an attempt of Mogan to intervene in its own behalf, is not consistent with the Record, as shown by the following extracts therefrom:

Page 308 of the Record, paragraph XXXIII, contains the following language from the motion of Mogan, filed February 6, 1939, to be made a party to the cause, which

is the first of the motions referred to in the above-quoted paragraph from the opinion of this Court:

"XXXIII. That this Petition is filed by Mōkan as the owner of a substantial interest in the capital stock of Panhandle Eastern as aforesaid, both in its own right and also in behalf of and for the benefit of Panhandle Eastern for the reason that Panhandle Eastern has refused to intervene herein and to assert its rights arising out of the said violations of the said Decree."

From this it is plain that this first motion of Mōkan (1) was filed not only in its own right but also in the right of Panhandle Eastern and (2) asserted Panhandle's rights under the decree, which, as this Court has decided, exist only under Sections IV and V of the decree. In fact, this first motion, in paragraph XXIX thereof (R. 307), sets out Section V in full, and previous paragraphs (pars. XIV to XVIII, R. 292 to 295) quote from Section IV and allege breaches thereof. If a fuller discussion of this is desired, reference may be made to pages 55 to 61 of the brief of appellee Columbia Gas & Electric Corporation and pages 43 and 44 of the brief of appellee Columbia Oil & Gasoline Corporation.

We would therefore respectfully ask that the paragraph of this Court's opinion quoted above be changed to correspond in this respect with the Record.

Such change of the statement of fact will also require some modification of the remaining language of the paragraph regarding the application of the principle of *res judicata*. Inasmuch, however, as this Court has decided that there are differences between the legal claims asserted in this

prior motion and the later motion under consideration on this appeal, it would result that the rule of *res judicata* would not bar the later motion in its entirety, but only operate as a bar to reopening those legal claims which were contained in the prior motion as well as in the later motion. We, of course, do not presume to state to this Court by what words the language of the said paragraph of its opinion should accordingly be modified. However, if it will help the Court in its consideration, we would suggest the following language as a substitute for the last three sentences of the paragraph in question:

It is true that the first motion by Mogan to intervene was brought in the right of Panhandle as well as in its own right, and asserted the latter's rights under the decree as well as a general claim to intervention outside of the decree. But the earlier motion and the present motion each involved, respectively, certain legal claims differing somewhat from the claims asserted in the other motion. Consequently, while the bar of *res judicata* does apply to such legal claims, contained in the present motion, as were also contained in the first, it does not apply to the residue.

To the contention of *res judicata* the reply brief of the appellant made the following answers, which it may be presumed it will reiterate on this petition for rehearing:

(a) That the first motion of Mogan did not seek to assert the rights of Panhandle under the decree (their reply brief, p. 16). But the above-quoted references to the Record show this to be incorrect as a statement of fact;

(b) That, assuming the first motion did assert the rights of Panhandle, the rule of *res judicata* would not apply because Mogan can take advantage of the fact that on the earlier motion it omitted to cause Panhandle to be made a party so as to be entitled to be heard and that therefore the judgment was a nullity for this purpose (their reply brief, pp. 16-20). But it was not a nullity as to Mogan in its capacity of the asserter of the rights of Panhandle, which is the same capacity in which it brings the present motion, on which it has also omitted to cause Panhandle to be actually made a party so as to be entitled to be heard; and

(c) That the denial of the first motion was not upon the merits after a trial on the facts of the allegations thereof and therefore cannot operate as *res judicata* (their reply brief, pp. 21-22). But the authorities unanimously hold that a prior motion to be made a party, denied for lack of merit on its face as was the first motion here, and unreversed, operates to bar a subsequent motion so far as the latter sets up a claim on the same facts as the earlier motion, even though there was no trial of the facts with judgment on the merits on the first motion: see *United States Trust Co. v. Chicago Terminal T. R. Co.*, 188 Fed. 292 at 299-300 (C. C. A. 7th 1911) and *McDonald v. Seligman*, 81 Fed. 753 at 759 (C. C. N. D. Cal. 1897), cited in brief of appellee Columbia Gas & Electric Corporation, pp. 58-60 and in brief of appellee Columbia Oil & Gasoline Corporation, pp. 55-56.

We, therefore, file this petition for rehearing, not for the purpose of asking this Court to change its judgment that the order of the District Court appealed from be reversed, but solely for the purpose of correcting certain statements in the opinion which do not correspond with the Record.

All of which is respectfully submitted.

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DANIEL O. HASTINGS,
WILLIAM H. BUTTON,
JAMES B. ALLEY,
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March 12, 1941.

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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Electric Corporation*

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Gasoline Corporation*

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SUPREME COURT OF THE UNITED STATES.

Nos. 268, 269.—OCTOBER TERM, 1940.

Missouri-Kansas Pipe Line Company,
Appellant,

268

vs.

The United States of America, Colum-
bia Gas & Electric Corporation, Co-
lumbia Oil & Gasoline Corporation,
et al.

Panhandle Eastern Pipe Line
Company, Appellant,

269

vs.

The United States of America, Colum-
bia Gas & Electric Corporation, Co-
lumbia Oil & Gasoline Corporation,
et al.

Appeals from the District
Court of the United
States for the District of
Delaware.

[March 3, 1941.]

Mr. Justice FRANKFURTER delivered the opinion of the Court.

These proceedings grow out of a suit in equity brought by the Attorney General in 1935 to enforce the anti-trust laws. That suit was terminated by a consent decree the terms of which specifically reserved certain rights to the Panhandle Eastern Pipe Line Company. The issues here revolve around the scope of those provisions of the decree.

In its bill the Government charged that Columbia Gas & Electric Corporation and its controlled instrumentality, Columbia Oil & Gasoline Corporation, together with individual defendants, had conspired, for the benefit of Columbia Gas, to shut out operation in the Indiana-Ohio-Michigan area by the Panhandle Company, which had built a natural gas pipe line from the Texas fields to the border of Indiana. Panhandle was an offspring of Missouri-Kansas Pipe Line Company (hereafter called Moka), which, at the inception of the Government's suit, still owned half of Panhandle's stock and

so it was claimed

held half its junior debt. Columbia Gas, it was charged, had a practical monopoly of natural gas in the market which Panhandle proposed to enter, and to maintain this monopoly Columbia Gas acquired domination of Panhandle through the acquisition by Columbia Oil of half of Panhandle's stock and junior debt and its whole senior debt. These acts stifled Panhandle's potential competition, rendered it insolvent, and forced Moka into receivership.

The consent decree sought to assure opportunities for competition by Panhandle. Deeming the terms of the decree inadequate for its purpose, the Government in 1939 reopened the proceedings. The defendants proposed modifications of the decree by a plan which the district court referred to a master. After the master's report approving the plan had been submitted but before the district court had acted upon it, two attempts to intervene were made on behalf of Panhandle. The denial of these two motions by the district court is the basis of the appeals here which come to us directly under the Expediting Act, 32 Stat. 823, as amended, 15 U. S. C. § 29. In No. 268 Moka, as a stockholder of Panhandle, made the appropriate allegations as to the unwillingness of those responsible for the actions of the corporation to protect its interests, and moved to intervene on behalf of Panhandle. In No. 269, the motion purported to be made in Panhandle's name. In addition to the formal parties, the City of Detroit was heard here as *amicus curiae* because of its interest in the supply of gas by Panhandle.

For clarity's sake, we shall first dispose of No. 268.

Numerous arguments were pressed upon us challenging our jurisdiction over the appeal, or, in the alternative, insisting on the propriety of the action of the district court. Treating Rule 24(a) of the Rules of Civil Procedure as a comprehensive inventory of the allowable instances for intervention, it is insisted that the present case is not one for intervention as of right, and as an exercise of the district court's discretion is not reviewable here. In any event, the order of the district court is said not to be a "final decree" within the Expediting Act, compare *United States v. California Canneries*, 279 U. S. 553, 556, and on this score not reviewable. If the merits be here open, the order was correct because there was not "timely application", as required by Rule 24(a). Finally, various considerations of controlling public interest are invoked to sustain the district court: the Attorney General is the guardian of

the public interest in enforcing the anti-trust laws, compare *New York City v. New York Telephone Co.*, 261 U. S. 312; injection of new issues ought not to be allowed to delay disposition of the main litigation, see *United States v. Northern Securities Co.*, 128 Fed. 808, 813; a decree already entered should not be impeached by intervention, see *United States v. California Canneries*, *supra*, at 556.

All of these arguments misconceive the basis of the right now asserted. Its foundation is the consent decree. We are not here dealing with a conventional form of intervention, whereby an appeal is made to the court's good sense to allow persons having a common interest with the formal parties to enforce the common interest with their individual emphasis. Plainly enough, the circumstances under which interested outsiders should be allowed to become participants in a litigation is; barring very special circumstances, a matter for the *nisi prius* court. But where the enforcement of a public law also demands distinct safeguarding of private interests by giving them a formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion.

That is the present case. Panhandle's right to economic independence was at the heart of the controversy. An important aspect of that independence was the extension of its operations to permit sales in Detroit. The assurance of this extension was deemed so vital that it was safeguarded by explicit provisions in the decree. Section IV, which is in full in the margin,¹ contained those

¹ "That the defendants be and they are hereby perpetually enjoined from restraining or interfering in any manner in the freedom of Panhandle Eastern to contract or to finance or arrange the financing of all contracts, extensions (including the proposed new line to Detroit, whether or not built and owned by-it), repairs, maintenance, service, or improvements necessary in its business through or with any firm, person, or corporation with whom it may choose to deal (and to that end any such financial or contractual arrangements made by Panhandle Eastern to consummate its contract dated August 31, 1935, with the Detroit City Gas Company shall be subject to the approval of the trustee who shall receive, and consider the advisability of, alternative methods of financing from any responsible underwriter);

"That, if such contracts be made with or financial assistance be secured from Columbia Gas, such contracts may be made or financial assistance furnished only upon terms or conditions which do not in any way, directly or indirectly, presently or potentially, confer upon Columbia Gas any voting rights, control or participation in the management of Panhandle Eastern or confer any rights of ownership in the works or properties of Panhandle Eastern except as security for the investment; and in the event that Columbia Gas shall, with respect to any contract or any contractual rights of, any kind whatsoever

provisions, and by Section V, also set out below,² Panhandle, "upon proper application", could "become a party" to the suit "for the limited purpose of enforcing the rights conferred by Section IV". Mogan, on behalf of Panhandle, claimed that Columbia Gas had made financial arrangements, which we need not detail, that would in practice defeat the free enterprise of Panhandle. We are not concerned with the substantiality of this claim. The sole question before us is whether there was standing to make the claim before the district court. We hold there was such standing. To enforce the rights conferred by Section IV was the purpose of the motion. Therefore, the codification of general doctrines of intervention contained in Rule 24(a) does not touch our problem. And since the protection afforded Panhandle by Section IV of the decree could only be secured by the remedy designed by Section V, to wit, active participation in the suit, the denial of that protection is a definitive adjudication, and so appealable. See *Credits Commutation Co. v. United States*, 177 U. S. 311, 316; cf. *Cobbledick v. United States*, 309 U. S. 323. Nor can the enforcement of this protection be deemed remotely in conflict with the public duties of the Attorney General, nor to bring in digressive issues, nor to impeach the existing decree. It is a vindication of the decree.

A final contention in support of the order remains. It is based on two prior denials of motions by Mogan to intervene. Treating Mogan's motions as made on its own behalf on the score of its ownership of more than forty percent of Panhandle's stock, the district court denied the motions. Appeals from these denials were dismissed by the circuit court of appeals, 108 F. (2d) 614, and we denied certiorari, 309 U. S. 687. The denials are now urged as *res judicata*. But they were a rejection of Mogan's attempt to intervene in its own behalf. In neither instance was the relief denied deemed a mode of enforcing Panhandle's rights under Sections IV and V of the Decree. The earlier denials involved different legal claims from that now asserted, and, therefore, are no bar to the present proceeding.

or in equity, including any remedy hereunder.

² "That jurisdiction of this cause and of the parties hereto is retained for the purpose of giving full effect to this decree and for the enforcement of strict compliance herewith and the punishment of evasions hereof, and for the further purpose of making such other and further orders and decrees or taking such other action as may from time to time be necessary to the carrying out hereof; and that Panhandle Eastern, upon proper application, may become a party hereto for the limited purpose of enforcing the rights conferred by Section IV hereof."

U. S. 687. The denials are now urged as *res judicata*. But they were a rejection of Moka's attempt to intervene in its own behalf. In neither instance was the relief sought a mode of enforcing Panhandle's rights under Sections IV and V of the decree. The earlier denials involved different legal claims from that now asserted, and therefore are no bar to the present proceeding.

In No. 269 Panhandle's intervention was sought by a different route. At a meeting of the stockholders of Panhandle a resolution was introduced authorizing this proceeding. It was defeated because Columbia Oil's holding of Panhandle stock was voted against it. Moka claimed that this stock was disqualified from being voted on a matter so deeply touching the self-interest of the Columbia companies. If this stock be not counted, so runs the argument, Moka's votes constituted a majority and the resolution carried. But we need not pass on these problems of corporate control, because under our decision in No. 268, Panhandle's participation, derivatively asserted by Moka, is secured.

In a memorandum filed by the Attorney General we are advised that on January 18, 1941, the district court filed an opinion approving the plan for modifying the original decree subject to some suggestions by the Government. This, we are told, "is believed to satisfy the public interest", and so the Government desires to sustain the action of the court below without further litigation. We recognize the duty of expeditious enforcement of the anti-trust laws. But expedition cannot be had at the sacrifice of rights which the original decree itself established. We assume that the district court will adjust the right which belongs to Panhandle with full regard to that public interest which underlay the original suit.

The order in No. 268 is reversed, and that in No. 269 is affirmed.

So ordered.

Mr. Justice ROBERTS is of opinion that both judgments should be affirmed.

Mr. Justice DOUGLAS and Mr. Justice MURPHY took no part in the consideration or disposition of this case.